Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

No. 94-799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOSEPH WILLIAMS, Superintendent,
Fulton Correctional Facility,
Petitioner,

v.

PETER VIDAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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November 1994

14 pp

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit correctly determined that the exclusion of Peter Vidal's parents from the courtroom during the testimony of a key witness was a violation of his right to a public trial, in the absence of any evidence that they posed a threat to the witness?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Peter Vidal respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 31 F.3d 67 (1994).

STATEMENT OF THE CASE

The Trial

This was a routine $20 street level drug sale case. On January 5, 1988, while working in a corner store, Peter Vidal allegedly sold a single vial of cocaine to an undercover officer. T. 137-38.[1] The officer was involved in a "buy and bust operation" which is no more than the officer's one time attempt to buy a single dose of drugs from a person who looks like he or she might be selling. If the undercover officer successfully makes a buy, he radios a description of the suspect to nearby backup officers, who then come in and, usually within minutes, make an arrest. What is not involved in a buy and bust operation is any long term investigation of any person or persons suspected of selling drugs. The State's only witnesses at trial were the undercover officer who allegedly made the buy and the arresting officer.

During trial, the State moved to have all spectators, including Peter Vidal's parents, excluded from the courtroom during the undercover officer's testimony. T. 118-19, 126-28. Defense counsel specifically objected to the exclusion of Peter Vidal's family. T. 125-130.[2] The officer's testimony at the

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1. References to the trial transcript, the State's Petition for Certiorari, and the Appendix will be cited as "T.", "P.", and "A.", respectively.

2. The State's representation that "[d]efense counsel agreed that the general public could be excluded upon the basis provided," P. 3, misconstrues the record. Although defense counsel offered the reasonable alternative that, at the very least, Peter Vidal's parents should be able to attend, he never conceded that the State had demomstrated an adequate basis for excluding anyone from the courtroom.

brief in camera hearing, represented nothing more than that, like every other undercover officer, he feared having his identity exposed. T. 121-22.

The State's assertion that the officer "feared for his life if his identity became publicly known because other undercover officers had been harmed after their identities were divulged in open court," P. 2, is unsupported by the record. While he testified that more than one unspecified officer, involved in unspecified types of undercover activity, had been threatened when their identities became known, T. 123, there was no evidence that their identities had been revealed as a result of testifying in open court. This officer, however, who had been working undercover for two years, T. 120, had never been threatened in this or any other case, T. 122-23.

As for Peter Vidal's parents, the prosecutor was "sure they're very decent individuals." T. 126. They lived about three miles from the scene of their son's arrest. T. 125-26. The officer did not know them nor had he ever been threatened by them. T. 124.

The state trial court locked Peter Vidal's parents, and all other spectators, from the courtroom during the officer's testimony. T. 128-30. The court's decision was based on the speculation that because the officer worked for what it assumed was a "Bronx-wide unit", and because Peter Vidal's parents lived in the Bronx, "its conceivable and entirely possible that the Officer may be recognized by them while he's involved in another undercover operation, and if the defendant is convicted . . .

they may not have a fondness for the officer." T. 129 (emphasis added).

On February 10, 1989, Peter Vidal was convicted of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, see N.Y. Penal Law § 220.39(1), 220.16(1), and sentenced to two concurrent terms of five to ten years imprisonment.

The State Court Appeal

On April 9, 1991, the Supreme Court of the State of New York, Appellate Division, First Department affirmed Mr. Vidal's conviction. On June 27, 1991, leave to appeal to the New York State Court of Appeals was denied.

The Ruling on Habeas Corpus

On July 20, 1993, the United States District Court for the Southern District of New York denied Mr. Vidal's petition for writ of habeas corpus. A. 10-12.

The Decision of the Court of Appeals

On July 29, 1994, the Second Circuit reversed and remanded with instructions to grant the writ. A. 2-7. The court reasoned that, under the particular facts of this case, it is simply inconsistent with the Sixth Amendment to "hold that a courtroom can be closed to a defendant's relatives as long as the relatives live (or, presumably work) in the county where the undercover officer works." A. 7.

On August 22, 1994, the Second Circuit's mandate issued. On that same date, the State filed an untimely motion to stay the mandate; that motion was summarily denied. On October 3, 1994, pursuant to the Second Circuit's mandate, the district court entered its order granting the writ and allowed the State a reasonable time to retry the case.

REASONS WHY THE PETITION SHOULD BE DENIED

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY DETERMINED THAT, IN THE ABSENCE OF ANY EVIDENCE THAT THEY POSED A THREAT TO THE WITNESS, THE EXCLUSION OF PETER VIDAL'S PARENTS FROM THE COURTROOM DURING THE TESTIMONY OF A KEY WITNESS WAS A VIOLATION OF HIS RIGHT TO A PUBLIC TRIAL.

This case demonstrates nothing more than the well-settled principal that a defendant's right to a public trial must give way to other interests only in rare and compelling circumstances, and "the balance of interests must be struck with special care." Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 2215 (1984);[3] see also Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 509-10, 104 S. Ct. 819, 824 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07, 102 S. Ct. 2613, 2620 (1982) ("the State's justification in denying access must be a weighty one"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81, 100 S. Ct. 2814, 2829-30 (1980) (opinion of Burger, C.J.). That this well-settled principal precluded closing the courtroom in this case is all the more apparent because, despite what the State refers to as "the breadth of the nation-wide drug problem," P. 5, not a single published decision from any other state has approved of completely closing the courtroom in such a routine street level drug sale case.

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3. In Waller, this Court held that the test established in Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819 (1984), for determining when courtroom closure is appropriate for First Amendment purposes also applies in the Sixth Amendment context. 467 U.S. at 47, 104 S. Ct. at 2216.

The Second Circuit decided an even narrower issue -- whether the exclusion of Peter Vidal's family from the courtroom was proper. As the Second Circuit correctly concluded, where there is absolutely no evidence that Peter Vidal's parents posed any threat to the undercover officer, Mr. Vidal's right to have them present as he went to trial could not validly be overcome.

Contrary to the State's representation, the Second Circuit did not create a new "inclined to harm" rule for excluding members of the public from the court. See P. 6-7. The Second Circuit simply applied two basic principles. First, that the closure determination must be made on a case by case basis, after a careful evaluation of the circumstances, "for it is clear that the circumstances of the particular case may affect the significance of the interest" the State seeks to protect. Globe Newspaper Co., 456 U.S. at 607-08, 102 S. Ct. at 2620-21. Second, that this Court has long guarded with special solicitude an accused's right "to have his friends, relatives, and counsel present no matter with what offense he may be charged." In re Oliver, 333 U.S. 257, 272 (1948).

The circumstances of this particular case presented no justification for keeping Peter Vidal's parents out of the courtroom. Indeed, the very facts that the State relies on for the "implicit" threat to the officer's well-being, P. 7, underscore the weakness of their argument. The only known location where the officer worked was about three miles away from where Peter Vidal's parents lived. In a county covering 41 square miles with 1.2 million residents, see People v. Martinez, 82 N.Y.2d 436, 443, 604 N.Y.S.2d 932, 936 (1993), they were, in

effect, worlds apart. Only by combining the unlikely possibility of a subsequent chance encounter with the officer (while he was working undercover), with the baseless assumption that these "very decent individuals" would expose his identity to a drug dealer, does the State arrive at its "implicit threat." That the Second Circuit concluded that Peter Vidal's parents could not be excluded from the courtroom on the basis of speculation and conjecture is certainly no radical departure from established law.

The State is also incorrect in its assertion that "this Court has never decided whether Waller's 'overriding interest' requirement to justify the complete closure of a pre-trial proceeding should apply to closure of a limited portion of a trial." P. 8. More than ten years ago this Court held that a "compelling" or "overriding" interest must be demonstrated in order to exclude the public from even a portion of a criminal trial. See Globe Newspaper Co., 457 U.S. at 606-609 (portion of sex offense trial when minor victim testifies can be closed only on showing of "compelling governmental interest"); Press-Enterprise Co., 464 U.S. at 509-511, 104 S. Ct. at 824-25 (closing all but 3 days of 6 week voir dire improper where "overriding interest" was not demonstrated).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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November 22, 1994